STATE OF MICHIGAN

IN THE SUPREME COURT

MARIE DEAN, PERSONAL REPRESENTATIVE OF THE ESTATES OF TALEIGHA MARIE DEAN, DECEASED, AARON JOHN DEAN, DECEASED, CRAIG LOGAN DEAN, DECEASED, AND EUGENE SYLVESTER, DECEASED

Plaintiff-Appellee,

-vs-

JEFFREY CHILDS AND THE CHARTER TOWNSHIP OF ROYAL OAK

Defendants-Appellants.
_____/

Supreme Court
Case No.: 122171

Court Of Appeals
Case No.: 240573

Oakland Circuit Court
Case No.: 01-029844-NO

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PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL FILED ON BEHALF OF DEFENDANT CHILDS

PROOF OF SERVICE

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STATEMENT OF ORDER APPEALED FROM

Plaintiff-Appellee adopts the Defendant-Appellant's Statement of Order Appealed From as stated in their Notice Of Filing Application For Leave To Appeal To The Supreme Court with the exception that this case actually involves the imposition of liability on Royal Oak Township Firefighters for fatal injuries sustained as a result of their affirmative acts which directly caused the deaths of the minor Plaintiffs-Appellees.

Further, the Michigan Court of Appeals applied the correct standard and their Opinion dated May 13, 2004, is not inconsistent with the Michigan Supreme Court Opinion of Robinson v City of Detroit, 462 Mich 439 (2000).

COUNTER STATEMENT OF QUESTION PRESENTED

COUNTER STATEMENT

I. WHERE PLAINTIFF'S DECEDENTS DIED IN A HOUSE FIRE, THE COMMISSIVE GROSSLY NEGLIGENT ACTS TAKEN BY THE FIREFIGHTER, AFTER THE FIRE WAS STARTED WAS THE MOST IMMEDIATE, EFFICIENT, AND DIRECT CAUSE OF THE INJURY AND DEATHS OF PLAINTIFF'S DECEDENTS PURSUANT TO MCLA 691.1407(2)(c).....

PLAINTIFF-APPELLEE'S STATEMENT OF MATERIAL FACTS

Plaintiff's decedents, four young children, died in a tragic home fire on April 6, 2001. During that time Defendant-Appellant, Jeffrey Childs, was a fire fighter employed by the Royal Oak Township Fire Department and was also acting as the scene commander while the fire fighters were attempting to extinguish the fire. Since that time Mr. Childs was terminated from his employment. Plaintiff's complaint alleges gross negligence against Mr. Childs and is premised on firefighter Child's commissive conduct which occurred after the fire started and which directly caused the death of the Plaintiff's decedents. Attached to Plaintiff's complaint and incorporated therein is an affidavit of Royal Oak Township Firefighter John Soave. Firefighter Soave makes it clear the conduct of Mr. Childs is what caused the death of the four children. It was not the fire itself. Firefighter Soave was in the process of rescuing the six children at the rear of the house and in fact rescued two of the children. While the fire was limited to the front porch, Mr. Child's spraying water on the front of the house pushed the flames and heat to the rear of the house preventing the firefighters from rescuing the remaining children because the heat was too great. Firefighter Soave also makes it clear that had firefighter Childs not have acted in such a manner the children would have been rescued and lived.

STANDARD OF REVIEW

Plaintiff-Appellee adopts the Standard of Review as asserted by Defendant-Appellant in his Notice of Filing Application For Leave To Appeal To The Supreme Court.

ARGUMENT

DEFENDANT-APPELLANT CHILDS' COMMISSIVE, GROSSLY NEGLIGENT ACTS WERE "THE" PROXIMATE CAUSE OF THE PLAINTIFF-APPELLEE'S DECEDENTS' DEATHS, WITHIN THE MEANING OF THAT TERM AS DEFINED BY THIS COURT IN CONSTRUING THE PROVISION OF MCL 691.1407 (2) (c).

The only issue to be addressed in this brief concerns whether sufficient evidence has been adduced in avoidance of the doctrine of governmental immunity to allow this matter to proceed to a jury trial. This Court is not being asked to declare that defendant-appellant Childs' commissive actions were grossly negligent as a matter of law.

Again, the salient facts are that Childs, a firefighter in the employ of erstwhile defendant, Charter Township of Royal Oak, a Michigan chartered township, was engaged with his cohorts in fighting a fire at Plaintiff-Appellee's residence. While his co-firefighter, Soave, was engaged in rescuing two of the children at the rear of the residence, Childs began spraying water on the front of the burning house, causing the flames to be directed and forced to the rear of the house. This action directly prevented the rescue of the remaining four children in the house, who perished. NOTE: The Court of Appeals' statement that no children were saved is askance with the actual facts of this case.

With reference to firefighter Soave's affidavit, based on his knowledge of the particular circumstances and his experience as a firefighter, Soave declared that the commissive acts of Childs in directing water at the front of the burning home caused the fire to be directly pushed to rear of that house, where the remaining children were located. This directly increased the danger to the children and prevented Soave from rescuing them.**(Exhibit A - Affidavit of Firefighter John Soave)** Certainly, as postulated by

Defendant-Appellee's own brief, at fn. 17, all allegations in firefighter Soave's affidavit are to be take as true.

Viewing these facts in a light most favorable to the non-moving party, as the law requires, this is not an instance of an omissive failure to act, but a case in which Childs' commissive acts directly and proximately caused the deaths of four children. In point of fact, had Childs done nothing at all, the children would have been rescued and survived the fire. The fire was already underway and limited to the front porch of the house, when Childs' commissive, grossly negligent acts turned what was merely a potentially dangerous fire into a fatal one.

Contrary to Defendant-Appellee's assertion in the denied motion for summary disposition below, the fire itself was not the most immediate, efficient, and direct cause of the injury, since, but for Childs' intervening, grossly negligent, and wrongful acts, the children would not have died.

Childs' actions are the closest in time and proximity to the injury. They set into effect a chain of forces and events that killed the children and, without which, the children's rescue would have been effected. Again, they were the immediate, efficient, and direct cause of the children's deaths. The law as articulated by our Legislature, and construed by this Court, does not require more for a finding of liability against Childs.

The touchstone of the applicable law is P.A. of 1964, No. 170, as amended, being the Michigan Governmental Immunity Act. This law as adopted in response to the considerable legal ferment engendered by a series of varying decisions in this area of law. In addition to reaffirming the general immunity of government and its officials and workers from tort liability for acts involving a governmental function, the statutes comprising this Act

gave rise to certain, carefully delineated exceptions. Since Ross v Consumers Power Co [on rehearing], 420 Mich 567; 363 Nw2d 641 (1984), these exceptions to the general broad grant of governmental immunity conferred by the statute have been narrowly construed.

With respect to the immunity from liability conferred on governmental employees, MCL 691.1707(2) states that governmental employees shall be immune from tort liability caused by the employee while in the course of employment for a governmental agency if three requisites are met. Two of these requisites are satisfied in the matter at bar. There is no real question that Childs was acting in his employ as a Charter Township of Royal Oak firefighter, and none that firefighting is a governmental function. It is the third requisite that forms the stumbling block upon which Childs' assertion of immunity falls.

MCL 691.1407(2) (c) provides, in pertinent part, that the employee's conduct does not amount to gross negligence that is THE proximate cause of the injury, emphasis added by writer. Subsection (c) goes on to define "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." See Robinson at 462 Mich 439, 458.

Robinson involved consolidated cases addressing the question of liability of the City of Detroit, and certain of its police officers, for deaths and injuries that took place in instances where the police were conducting car chases. In one instance, the fleeing vehicle collided with a house, while in the second instance the fleeing vehicle collided with another vehicle. Obviously, in both instances, the injuries occurred as a result of the intervening negligence of the vehicles' operators in deciding to flee the police at high speed, AFTER the chase was commenced. The operators' negligence was therefore SUBSEQUENT to any negligence of the officers and formed a separate, later in time,

proximate cause of the collisions and injuries.

At pp 458-460, the majority opinion in Robinson, utilizing carefully chosen and articulated principles of statutory construction, reasoned that the legislative use of the word "the", as opposed to use of the word "a", in defining such a "proximate cause" as would occasion employee liability under MCL691.1407(2) (c), intended that such employee gross negligence must be the "[o]one most immediate, efficient, and direct cause preceding an injury." Robinson, at 462 Mich 439, 459, 462.

The majority ruling based this finding on a perceived legislative intent to differentiate tort claims against governmental employees operating in governmental capacities from such claims made against other person not so situated. Simply put, "a" denotes a reference to any of a number of possible items, while "the" denotes reference to a single item. Plaintiff-Appellee adopts those cases and articulated principles as part of this brief, verbatim.

Applying this principle to the cases at hand, the majority found that the negligence of the fleeing vehicles' operators was the one most immediate, efficient and direct cause of the accident and the complained injuries, since it superseded the claimed negligence of the officers in both time and direct causation.

The reasoning of this Court is clear. Governmental employee tortfeasors are afforded a DOUBLE LAYER OF ADDITIONAL PROTECTION above and beyond that afforded private tortfeasors in negligence cases. The first protection is that governmental tortfeasors are only liable for gross negligence, as defined by the statute. The second protection is that the alleged governmental tortfeasor's grossly negligent act or omission must be THE one most immediate, efficient, and direct cause of the injury, as opposed to

private cases, where the proximate cause may be multiple in nature.

Subsequently published decisions of the Court of Appeals have followed this principle faithfully. For example, in Regan v Washtenaw County Road Commission, 257 Mich App 239 (2003), Plaintiff was injured when she collided with the third of five broom tractors being used to clean a road. The Court of Appeals found that the blinding dust cloud obscured Plaintiff's vision. When she moved to the left to avoid the vehicle she collided with the third vehicle, which had strayed from its lane. This action by the broom tractor's operator was determined to state a viable claim for jury determination as to the issue of gross negligence being THE proximate cause of that accident because no subsequent, intervening negligence was present, and no other act more directly caused the injury.

Similarly, in Kruger v White Lake Township, 250 Mich App 622 (2002), Plaintiff's decedent was killed when, AFTER escaping police custody, he was run over by an automobile. The automobile's striking and killing decedent, not the actions of the police in alleged grossly negligently allowing decedent to escape their custody, was held to be the one most immediate, efficient, and direct cause of the "injury".

Likewise, in Curtis v City of Flint, 253 Mich App 555, 655 Nw2d 791 (2003), plaintiff sustained injuries when his vehicle was struck by another vehicle AFTER he pulled over to avoid an allegedly grossly negligently driven emergency vehicle. The negligence of the private vehicles' operator, not the emergency vehicle's operation, was held to be the one most immediate, efficient and direct cause of the Plaintiff's injuries. Note that the emergency vehicle never collided with Plaintiff's vehicle.

The above three cases bear a common theme. In the two cases where liability was

precluded, the alleged gross negligence of the governmental defendant was not a basis for liability because other, independent, acts of negligence by other persons intervened, and became the one most immediate, efficient and direct cause of the Plaintiff's injuries. In Regan, where a jury-submissible claim of governmental gross negligence was found, no such intervening, supervening negligence existed, leaving the complaint-of governmental employee gross negligence as the one most immediate, efficient, and direct cause of the Plaintiff's injuries.

Defense and amicus briefs also cite certain unpublished Court of Appeals opinions, having no precedential value. These may be summarily disposed of by noting in Crouch v Regional Emergency Medical Services, 2003 WL 21205844, **(Exhibit B)** the Plaintiff was injured AFTER he was turned over from police custody to an EMS unit. He escaped from that vehicle when he jumped from it. OBVIOUSLY, THE POLICE HAD CEASED ALL CONTACT WITH PLAINTIFF, HAD NO CUSTODY OVER HIM, AND COULD NOT BE FOUND TO HAVE OCCASIONED HIS INJURIES SUSTAINED IN JUMPING FROM THE EMS VEHICLE.

A similar result attended Ortiz v Porter, Court of Appeal No. 226466 (rel'd 11/30/01). In that case, a claim was made that injuries sustained in a rental home fire were occasioned by the landlord's failure to install a smoke detector. The Court of Appeals held that the SUBSEQUENT fire, not the earlier failure to install a smoke detector was the one most immediate, efficient, and direct cause of the Plaintiff's injuries. Contrast Ortiz to the case at bar, where Childs came upon a fire already in progress and, in an exercise of sheer gross negligence, increased its danger. Notably, the issue of statutory immunity was never briefed, it not being applicable.

Finally, defense recourse to Murdock v Higgins, 454 Mich 46, (1997) is wholly unavailing. Not only does this case precede Robinson, supra, it supports the position that subsequent negligence precludes a finding of liability for earlier gross negligence, only one cause being allowed. Indeed, the claim that a Social Service supervisor had negligently hired an employee who subsequently sexually molested the Plaintiff was denied on the grounds that the hiring supervisor was not the employee's supervisor at the time of the molestation. This Court properly deemed the negligent hiring claim to be too remote in time and causation, a result that does not disagree with the later holding in Robinson.

The upshot of the foregoing case analyses is clear. In all cases where liability was precluded, subsequent negligence or events created circumstances more directly and proximately causing the claimed injuries and damages. In cases where liability for governmental gross negligence was not precluded, no intervening actions or omission sufficient to create a more immediate, efficient, and direct cause of the injuries were shown.

As the attached affidavit of Child's co-firefighter, Soave, reveals, the house fire, however originated, was in progress when Childs and Soave arrived to extinguish it and protect possible victims. Soave was in the back of the dwelling, and had evacuated two children, but was precluded from evacuating the remaining four children, who perished, because Childs, who was in front of the dwelling, directed water against that area.

Childs, as an experienced firefighter, knew or should have known that such action would force the devouring flames into the back of the burning house. Nonetheless, he proceeded in his folly. Certainly, reasonable persons could differ on whether Childs' actions were so reckless as to display a substantial lack of concern for whether an injury

resulted. An affirmative finding on the question would incur liability for gross negligence.

Firefighter Soave, as an experienced practitioner of that trade, will give substantial testimony as to the recklessness of Childs' action, and will testify that he could have rescued all of the children had Childs refrained from his reckless indifference. Indeed, had Childs done not a thing; nothing at all, Plaintiff's decedent would have survived the fire. No alleged negligence intervening or supervening Childs' actions in making the fire enormously more dangerous can be argued or presented. His was the last, causative act that occasioned this unspeakable tragedy. The lower courts were correct in denying Childs' motion for summary disposition on the issue of his gross negligence.

It should be noted that unlike the question of duty, the existence of which poses a legal issue for the trial court, the issue of proximate causation forms a factual question for the trier of facts, in this instance a jury, to decide. A plethora of cases prove the point.

Attention is particularly drawn to Wilkinson v Lee, 463 Mich 398 (2000), a post-Robinson opinion involving all members of the present Court. In that case, involving an appeal from a jury verdict, in which the Court of Appeals overturned a jury finding of proximate causation, this Court ringingly declared that, even in cases involving thin claims of proximate causation, a jury's determination should be honored unless, after reviewing the evidence, and all legitimate inferences from it, in a light most favorable to the non-moving party, the evidence so view fails as a matter of law to establish a viable claim. This principle was also followed in Harris v Rahman, 2004 WL 1636582 (Mich App) **(Exhibit C)**and relied upon Robinson in determining that the alleged gross negligence of a county employee who failed to evacuate a family residence due to the existence of mercury which

was causing injury to the Plaintiff was a question of fault for the jury. The opportunity to present such viable evidence to a jury is all that Plaintiff-Appellant asks in this case.

A word seems necessary on the issue raised by amicus. i.e. the omnipresent cry that a finding in Plaintiff-Appellee's favor would open the proverbial "floodgates", et al. Amicus, and the defense, fail to consider that the Legislature has already addressed the issue by providing A DOUBLE LAYER OF PROTECTION AFFORDED ONLY TO GOVERNMENTAL DEFENDANTS. Just as this Court inferred in Robinson, even as a court may not ignore statutory syntax to reach a desired result, neither may it engraft onto a statue provisions the Legislature has not seen fit to include. In light of this settled principle of statutory construction, defense arguments of necessity, unwarranted litigation, and the like are without foundation.

In conclusion, the facts and proceeding show no novel issue not addressed by Robinson. They show no cause for overturning the reasoned decision of the Court of Appeals' majority, or for modifying prior case law in any way. Nor is a conflict in the Court of Appeals decision presented. In short, there is no cause shown to grant the present application. It should be denied and remanded for trial based on the ruling of the Court of Appeals.

RELIEF REQUESTED

Plaintiff-Appellee respectfully requests that this Court deny Defendant-Appellant's Application for Leave to Appeal and Remand this cause to the Circuit Court.

Dated: February 25, 2005

Respectfully Submitted,

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